

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO DESTIN JOHNSON,

Defendant-Appellant.

UNPUBLISHED

October 15, 2013

No. 310919

Oakland Circuit Court

LC No. 2012-240027-FH

Before: M. J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Defendant Antonio Destin Johnson appeals of right his jury convictions of second-degree fleeing and eluding, MCL 257.602a(4)(a), receiving and concealing stolen property, MCL 750.535(7), driving while license suspended, MCL 257.904(1), and attempting to unlawfully drive away an automobile, MCL 750.413. The trial court sentenced Johnson as a fourth habitual offender, MCL 769.12, to serve 7 to 40 years in prison for both his second-degree fleeing and eluding conviction and his receiving and concealing stolen property conviction, to serve 7 to 15 years in prison for his attempting to unlawfully drive away conviction, and to serve 93 days for his driving while license suspended conviction. On appeal, Johnson argues that the trial court erred in calculating his sentencing variables; specifically, he argues that the trial court should have scored prior record variable (PRV) 5 at 5 points and should have scored Offense Variable (OV) 14 at zero. As a result of these alleged errors, Johnson maintains that he is entitled to resentencing. Because we conclude that there were no sentencing errors warranting relief, we affirm.

The sentencing guidelines are a comprehensive, integrated, and mandatory sentencing scheme; trial courts must score them and must score them properly. *People v Bemer*, 286 Mich App 26, 32, 34-35; 777 NW2d 464 (2009). This Court reviews de novo whether the trial court properly interpreted and applied the sentencing guidelines to the facts. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). And this Court reviews the trial court's findings underlying a particular score for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

With regard to OV 14, Johnson contends that the trial court clearly erred when it found that he was a leader in a multiple offender situation. The trial court had to score OV 14 at 10 points if Johnson was a leader in a multiple offender situation. MCL 777.44(1)(a). If Johnson was not a leader, then the trial court had to score zero points under OV 14. MCL 777.44(1)(b).

Testimony established that, on the night at issue, Johnson was driving a van that had signs of having been stolen. He drove that van with three other persons and parked it near a second van. He got out of the van he was driving, walked up to the parked van, and forced entry. Testimony established that he unsuccessfully tried to start the second van. While Johnson was attempting to start the second van, one of his passengers got into the driver's seat of the first van. However, after Johnson could not start the second van, the passenger returned to his seat and Johnson took control of the first van and drove off. After police officers began to pursue Johnson, his passengers tried to get him to slow down, but he refused.

Thus, the evidence showed that the offenses at issue occurred as part of a multiple offender situation. The evidence that Johnson drove to the location and was the person who actually forced entry into the second van strongly suggested that he selected the target and that his accomplice or accomplices were merely responsible for driving the first van away. Moreover, the evidence that his accomplice returned to his seat after Johnson was unable to start the second van and that he refused to slow down after officers began to pursue him despite the pleas of the persons with him permitted an inference that Johnson was the group's leader. Given these facts, we cannot conclude that the trial court clearly erred when it found by a preponderance of the evidence that Johnson was a leader in a multiple offender situation. *Osantowski*, 481 Mich at 111.

Johnson also contends that the trial court erred when it scored PRV 5 at 10 points because he only had two prior qualifying convictions. However, assuming that the trial court should have scored this variable at five points rather than ten points, Johnson would not be entitled to relief because the error would not alter his sentencing range. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006).

Finally, Johnson argues that his trial lawyer was ineffective for failing to object to the trial court's decision to improperly score PRV 5. In order to be entitled to relief, Johnson must establish that his trial lawyer's failure to object fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the failure, the outcome would have been different. See *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), leave denied in relevant part 493 Mich 864 (2012). However, even if his lawyer's failure to properly object fell below an objective standard of reasonableness, Johnson cannot establish a reasonable probability that, but for that error, the outcome would have been different because the change in his total PRV score would not have altered his sentencing range. See *id.* at 23 (stating that a reasonable probability is a probability sufficient to undermine confidence in the outcome).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly

/s/ Kurtis T. Wilder

/s/ Karen M. Fort Hood